

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

June 10, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3462-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

WILLIAM T. NELL,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Reversed and cause remanded with directions.*

MYSE, J. The State appeals the trial court's determination that William T. Nell is not subject to the mandatory minimum sentence provided for alcohol related offenses and the imposition of a sentence lower than the minimum mandatory sentence provided by § 343.44, STATS. The State argues that the November 1988 suspension for noncompliance with an alcohol assessment interview makes the present offense of operating a motor vehicle after revocation

an alcohol related offense subject to the mandatory minimum penalty prescribed by statute. The State argues that the trial court had no discretion in imposing a sentence less than the minimum provided by law even though Nell had a series of offenses occurring after 1988. Because this court concludes that Nell's ongoing revocation based on his alcohol related offense is sufficient to require the application of the mandatory minimum penalties provided in § 343.44, STATS., the sentence is reversed and the matter remanded to the trial court for the imposition of the mandatory minimum penalty provided by statute.

Nell was stopped for a traffic violation in 1996. Investigation revealed that Nell's driving privileges were revoked on November 23, 1988, for noncompliance with an alcohol assessment interview. In addition to that offense, Nell has had other violations since 1988 including numerous convictions for operating after revocation, one conviction for speeding, one conviction for failing to yield the right of way, and one conviction for improper plates. He was determined to be an habitual traffic offender in 1992. Nell never regained a license after his 1988 conviction.

A plea agreement was made providing that Nell enter a plea of no contest to the operating after revocation fifth offense charge in exchange for the State recommending the mandatory minimum sentence and dismissing the allegation of habitual traffic offender. It was agreed that the offense was alcohol related and the punishment would be the minimum mandatory sentence provided for alcohol related revocations. The trial court, however, imposed a sentence less than the minimum mandatory sentence.

The sole issue presented for this court is whether the 1988 revocation for noncompliance with an alcohol assessment interview renders the

current driving after revocation offense as an alcohol related offense under the provisions of § 343.44, STATS., notwithstanding the number of nonalcohol related revocations that were ordered since the 1988 revocation. This presents a question of statutory interpretation which is determined independent from the trial court. *State v. Pham*, 137 Wis.2d 31, 33-34, 403 N.W.2d 35, 36 (1987).

Nell has failed to file a brief on this issue. Because the only brief before this court is presented by the State, it is possible to dispose of the matter presented based upon Nell's failure to participate in the appeal. *See* § 809.83, STATS. This court, however, will address the issue on its merits because of the importance of the issue presented and because the issue is likely to be raised again. *See State v. Avila*, 192 Wis.2d 870, 879, 532 N.W.2d 423, 425 (1995).

Section 343.44(1), STATS., provides that: "No person whose operating privilege has been duly revoked or suspended pursuant to the laws of this state shall operate a motor vehicle upon any highway in this state during such suspension or revocation Section 344.44(2g), STATS., provides:

[A]ny person who violates sub. (1) while his or her operating privilege is suspended or revoked for ... violating s. 346.63(1) ... is subject to the following penalties:

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- (e) For a 5th or subsequent conviction under this section or a local ordinance in conformity with this section within a 5-year period, the person shall be fined not less than \$2,000 nor more than \$2,500 and shall be imprisoned for not less than 6 months nor more than one year in the county jail.

In *State v. Doyen*, 185 Wis.2d 635, 641, 518 N.W.2d 321, 323 (Ct. App. 1994), we held that a revocation based upon a failure to comply with required alcohol assessment interview was a revocation within the meaning of

§ 343.44, STATS. Accordingly, we are required to conclude that the revocation in 1988 was alcohol related and the minimum mandatory sentence under § 343.44 is required to be imposed.

The trial court reasoned that the series of nonalcohol related revocations following the 1988 revocation brought the current offense outside of the mandatory sentence provisions of § 343.44, STATS. The court reasoned that the age of the alcohol related conviction and the number of intervening nonalcohol revocations were sufficient to avoid the mandatory minimum punishment. If remoteness is sufficient to prevent application of the mandatory minimum sentences, it will be necessary for the legislature to so provide. The statute as currently written makes no such provision for the consideration of remoteness. While the trial court may have been attempting to impose a less stringent sentence because of the age of the alcohol related offense, this court concludes that the mandatory sentencing provisions provided by statute must be applied.

Nell never regained a license after his revocation for OWI because he did not complete an alcohol assessment as ordered by the court. “When the defendant[] failed to comply with the court’s alcohol assessment order arising from the OWI convictions, [his] operating privileges continued suspended as required by statute.” *Doyen*, 185 Wis.2d at 642, 518 N.W.2d at 324. Nell’s suspension for that offense, therefore, continued throughout the relevant period. “Simply stated, § 343.44(2g) prohibits persons from operating a motor vehicle while their operating privileges remain suspended or revoked for violating § 346.63(1), STATS. (OWI).” *Id.* In this case, there is no question that the 1988 revocation for OWI is alcohol related and, accordingly, the mandatory minimum

penalties are required to be imposed notwithstanding the intervening nonalcohol related revocations that may have been ordered.

Because Nell's ongoing revocation for his 1988 OWI required the application of mandatory minimum penalties under § 343.44, STATS., the trial had no discretion to impose a sentence less than the minimum. Accordingly, this court reverses the sentence and remands the cause to the trial court for imposition of the minimum penalty provided by statute.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

